Reynolds Metal Company *and* Local 155, Aluminum, Brick and Glass Workers Union affiliated with Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC. Case 11–CA–13648

March 31, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case[1] present the issue of whether the Respondent violated the Act by unilaterally implementing a substance abuse policy and program without notice to or consultation with Local 155 as an exclusive joint bargaining representative of its employees.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] On October 9, 1992, Administrative Law Judge Robert A. Gritta issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge discredited the testimony of Local 155's president and business agent, Stephen Stoll, to the extent that he asserted that he made a demand for bargaining about the Respondent's substance abuse program to personnel managers at two of the Respondent's facilities. Because we adopt the judge's credibility resolutions, we find it unnecessary to pass on his further finding that even assuming Stoll made the demand as alleged, the demand was insubstantial and did not constitute a demand for bargaining necessary to give rise to a statutory obligation on the part of the Respondent.

[3] In support of his conclusion that the Respondent did not violate Sec. 8(a)(5) or (1) of the Act by failing and refusing to negotiate over the substance abuse program with Local 155, the judge relies, in part, on the International union's constitution. In particular, the judge notes that art. XV, sec. 1, states that the International union shall negotiate all labor agreements on behalf of the local unions, and sec. 2 states that the International president, or his designee, shall be the chairman of all negotiating committees. The judge then notes that the parties' collective-bargaining agreement in effect during the period in question provides for joint bargaining representative status for the local unions and the International union.

We find that additional support for the judge's conclusion that the Respondent did not unlawfully fail to negotiate with Local 155 about the substance abuse program is provided in the International constitution, at art. XV, secs. 4 and 5, where the constitution sets forth the express authority of the joint bargaining committee to bargain of items over mutual concern to the local unions, and the limited authority of the local unions to bargain over such items:

> Section 4. When joint negotiations are undertaken, a committee shall be established for such purpose. This Joint Negotiations Committee shall confine itself to economic and/or other issues which may be of mutual concern to the local unions involved. The extent of jurisdiction of such items as well as rules governing negotiations, shall be determined by the Joint Bargaining Committee.
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> Section 5. Each local union shall have jurisdiction over negotiable items which are of concern only to that particular local union, however, such items shall not conflict with the jurisdiction established by a Joint Bargaining Committee.

The substance abuse program was of national concern to the Union, as evidenced by the International's development of a policy on alcohol and drug abuse which it sent to the Respondent in July 1987, and the International's meetings with the Respondent on the subject in 1987 and early 1988. Further, a companywide policy on drug testing would be of ''mutual concern'' to the local unions, and as such would be an issue in the jurisdiction of the joint negotiations committee and not the locals, pursuant to sec. 4. This conclusion is strengthened by the International's request at the January 18, 1988 meeting with the Respondent that it would be more appropriate to discuss the substance abuse program with the joint bargaining committee. In addition, sec. 5 provides that items that the local has jurisdiction over shall not conflict with the jurisdiction established by the joint bargaining committee, and it appears that the joint bargaining committee established its jurisdiction over the corporatewide substance abuse program when it met with the Respondent on February 26, 1988.

In agreeing with his colleagues and the judge that the Respondent did not unlawfully fail or refuse to bargain about its substance abuse program, Member Devaney notes that the June 1, 1986, through May 31, 1989 collective-bargaining agreement between the parties does not contain a ''zipper'' clause or equivalent language, and that this case therefore does not present a situation in which an employer is arguably wielding such a clause as a ''sword'' to permit it to make unilateral changes in subjects not covered by the terms of the clause. See generally *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992) (Member Devaney dissenting).

Donald R. Gattalaro, Esq., for the General Counsel.
Patrick R. Laden, Esq., of Richmond, Virginia, for the Respondent

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on November 19 and 20, 1991, in Winston-Salem, North Carolina, based on a charge filed by Local 155, Aluminum, Brick and Glass Workers International Union Affiliated with Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC[1] (Local 155) on August 4, 1988, and a complaint issued by the Regional Director for Region 9 of the National Labor Relations Board on November 2, 1988. The complaint alleged that Reynolds Metal Company (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively and in good faith with a representative of its employees concerning the sub-

[1] Notwithstanding the Charging Party's name as stated on the charge, Local 155 is not an International union but rather is affiliated with the International Union in the traditional sense.

stance abuse program implemented in April 1988. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by General Counsel and Respondent. Both briefs were duly considered.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATIONS—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Reynolds Metal Company is a corporation engaged in the nationwide manufacture and nonretail sale and distribution of aluminum foil, powder, and extrusion products. This case involves the three locations in Louisville, Kentucky. Jurisdiction is not in issue. Reynolds Metal Company, in the past 12 months, in the course and conduct of its business operations shipped products from its Louisville, Kentucky facilities valued in excess of $50,000 directly to points located outside the State of Kentucky.

I conclude and find that Reynolds Metal Company is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that Local 155, Aluminum, Brick and Glass Workers Union and the Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC are labor organizations within the meaning of Section 2(5) of the Act.

II. ISSUE

Whether Respondent unilaterally implemented a substance abuse policy and program without notice to or consultation with an exclusive joint collective-bargaining representative of its employees.

III. BACKGROUND[2]

Since 1937, the Aluminum, Brick and Glass Workers International Union (herein ABG) and its Local 155 have been the designated exclusive joint collective-bargaining representative of Respondent's employees in appropriate units in the three plants located in Louisville, Kentucky. At present the ABG and its respective local unions represent employees of Respondent in a total of 11 or 12 plants nationwide. Additional plants of Respondent are represented by the Steelworkers Union.

Historically the Respondent and the two unions (ABG and Steelworkers) have coordinated bargaining for all plants and when feasible the Respondent and the two unions have coordinated their bargaining with the represented plants of ALCOA, another national aluminum producer.

For years the ABG has engaged in joint national negotiations with Respondent pursuant to its constitutional provisions designating the International president as chairman of all negotiating committees and establishing a joint negotiation (bargaining) committee made up of the International president, his aides, and the local union presidents or business agents. The joint bargaining committee determines the agenda for the national negotiations and has the authority to negotiate on behalf of all the local unions and the various plants. At the conclusion of national negotiations each local union bargains with its respective plant management over local work rules and other locally unique working conditions such as overtime scheduling and meal tickets. Although the Union's constitution provides that the International president can authorize a local union to bargain on its own behalf, no such authority was given to Local 155 at any time material herein.

Respondent's corporate industrial relations department negotiates at the national level and each plant personnel director negotiates at the local level. National negotiations include items of multiplant impact, those that affect more than one location and economic issues for all plants. In addition to wages, pension, insurance, and rates of pay a corporate job evaluation system is of national concern. Although jobs may differ in the plants the parties negotiate the manner to determine the relative values of the different jobs among the plants.

During 1986, the aluminum industry was experiencing cost problems resulting in hard bargaining over economics. ALCOA endured a nationwide strike lasting 6 weeks while Respondent resolved the issues in national negotiations and continued to operate its plants except the three facilities in Louisville, Kentucky, and a facility in Longview, Washington. The 1986 strikes were unique to the parties' labor relations in that prior to 1986 strikes were national in scope and were called by the ABG. The ratification process had been majority votes of all local unions. If a majority of local unions voted to accept the negotiated contract, it then applied to all local unions and their respective plants. In 1986, Local 155 had authority to initiate its own economic sanctions against the Employer at the Louisville facilities. The strike at the Louisville facilities involved a two-tier wage system at plants 3 and 15. Although the ABG was involved with the corporate staff in an attempt to settle the strike initially the local union and local management did ultimately resolve their differences and settle the strike.

IV. THE ALLEGED UNFAIR LABOR PRACTICE

The gravamen of this cause had its beginning in 1986. Peterson, corporate director of industrial relations for Respondent, testified without contradiction that the United States Occupational Safety and Health Administration has for years dictated uses of hardhats, safety glasses, safety shoes, safety spats, flame retardent clothing, and any number of specialized pieces of safety equipment, all designed to make the workplace safe for employees. Each state in which a plant is located also impresses on the Respondent certain controls or specified rules of workplace safety. All of these measures are relative to Respondent's responsibility for its workplaces. Respondent contracts with the Department of Defense and other Government agencies, which for employee safety require some measure of substance abuse control in the work-

[2] Based on undisputed testimony and objective evidence in the record.

place. In addition the Department of Transportation requires controls on substance abuse for employee and public safety. Government contractors such as Respondent must abide by the Drug-Free Workplace Act of 1988 which coexists with a national policy favoring regulation of drug use on and off the job.

The nature of the industry is defined by mechanical equipment, high electrical voltages, molten metal, and in some cases explosive materials, all which raise concerns for employees' responsibility. During 1986 Respondent initiated a policy of urinalysis drug testing for new hires throughout the corporation and following its institution began developing a corporatewide substance abuse policy (SAP) for all employees. While in the process of developing its SAP, Peterson received a letter, dated July 22, 1987, from ABG president, La Baff, stating that the ABG had adopted a policy on alcohol and drug abuse and enclosing a copy of that policy (R. Exh. 3). On September 18, 1987, Peterson sent a letter to La Baff notifying the ABG of a new corporate substance abuse policy adopted for all plants and enclosing a copy of that policy (R. Exh. 4, 5). On October 5, La Baff responded to Peterson's notification by demanding that Respondent negotiate with the ABG over the SAP for unit employees and job applicants prior to any implementation of such policy (R. Exh. 7). The parties agreed to meet December 14, 1987, at the ABG headquarters in St. Louis, Missouri, for the sole purpose of discussing the SAP. Respondent was represented by Peterson and Bob Newman, director of industrial relations operations and the Union was represented by La Baff and John Murphy, executive assistant to the president of ABG. Respondent presented its SAP to the Union including a title page outlining training of supervisors (R. Exh. 8). During discussions the Union, through La Baff, suggested that local union officers and grievance committeemen receive the same training as the supervisors. Following discussions the parties agreed to meet again on January 18, 1988, at the same location.

The parties did meet January 18 with the Union including an additional member, ABG General Counsel Thomas Powers. During the meeting Powers stated that Respondent could not implement the SAP without negotiating with the Union. La Baff suggested that it would be more appropriate to present the SAP to the joint bargaining committee of the Union. Respondent through Peterson agreed to meet with the joint bargaining committee on February 26, 1988. At some point before the scheduled February meeting Peterson caused a revised title page to the corporate SAP to be sent to the Union. The revision incorporated the suggested changes by La Baff at the first meeting (R. Exh. 9). Also La Baff informed Peterson on January 21 that Murphy was the new director of negotiations for the ABG (R. Exh. 1).

On February 26, the parties met with Respondent including Tom Stark, coordinator of bargaining for ABG, as a member of its team. The union team included Stephen Stoll, president and business agent of Local 155, and other local union's presidents and representatives as additions to La Baff, Murphy, and Powers. In addition to discussions between the teams the Respondent presented films to be used as training aids for the supervisors and union officials. Respondent detailed the procedures designed to implement the policy and fielded questions from the union team. Peterson recalled that most questions dealt with future plans rather than the SAP. Stoll recalled three questions: (1) ''is there an obvious drug problem in the plants,'' to which Respondent answered no; (2) ''is the contract being opened up,'' to which Respondent answered no; (3) ''If we don't negotiate do you intend to implement it,'' but according to Stoll, was not answered. Peterson states that the Union caucused in the room then invited the Company back to the room. La Baff speaking for the Union, stated that the Union would have a response soon. Peterson asked, ''How soon is soon?'' La Baff replied he would get back to Peterson within a week. Stoll testified that after the Company left the meeting the committee discussed drug testing. None of the local unions agreed with drug testing. All thought it was inappropriate.

With no response from ABG, Peterson called La Baff and asked when the Union would respond. La Baff said soon. Several days later, having heard nothing, Peterson called Murphy and asked when the Union would respond. Peterson made several additional calls to the ABG with the same result. On April 20, 1988, Peterson sent a letter to the ABG outlining three negotiation meetings over the SAP and emphasizing the ending of the February 26 meeting and citing the lack of any response from the Union (R. Exh. 10). The letter also advised the ABG that Respondent would implement the SAP in all its plants. There was no immediate response from the Union but on May 12, ABG General Counsel Powers informed Peterson by letter (R. Exh. 11):

> I wish to put you on notice that your unilateral decision to implement this policy would, in my opinion, be an unfair labor practice. New collective bargaining agreements were negotiated with Reynolds in 1986. The Company, during these negotiations, never put drug testing on the table. The collective bargaining agreements we reached with you in 1986 incorporate all the agreed upon terms and conditions of employment and drug testing is not included. Your attempt to modify or amend these agreements by unilateral implementation of your drug testing program violates our rights under the Act and accordingly, I ask that you rescind actions taken in this regard. You should advise local personnel managers that the Corporate Substance Abuse Policy cannot be implemented until agreed upon by the Aluminum, Brick and Glass Workers International Union. We are not willing to open up our contracts at this time and, therefore, the earliest this matter can be considered will be during negotiations on successor agreements.

Peterson did not reply to Powers.

Stoll testified that in mid-May he met with Carter and Growe, the local personnel directors for the three facilities in Louisville, Kentucky. His testimony on that meeting is as follows:

> A. Sometime during the month of May, we went down to Plant One for a grievance meeting.
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> Q. When you say ''we,'' who are you referring to?
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> A. It was myself, the secretary-treasurer of the Local, who is Gene Douglas and Robert Wisdom who is the general shop steward for that plant. We went down to have a grievance meeting and we were informed by Ike Growe, who is the personnel representative for that plant. Here again, someone informed me and we have a pretty good relationship, and Ike told me, you know, very casually, that Reynolds Metals was going to im-

plement the drug policy and that knowing me the way he did, that my response would probably be that he could take that drug testing policy and shove it up his ass. You know, in a joking type manner. My response was, No, Ike. You know, I don't like drug testing. I think it's an invasion of privacy. I think it violates our contract. And possibly some NLRB laws. But that, if indeed, Reynolds was hell bent on implementing it, I wanted to sit down and negotiate with them.

Q. What, if anything, did Ike Growe say in response to your request to negotiate?

A. Ike told me that it was a corporate policy. He wasn't in a position to negotiate. All he could do was tell me of the implementation.

Q. What, if anything, else happened at Local 155 relative to the program?

A. Soon thereafter, I believe in the same month of May, we were at one of the other plants, Plant Three, which is the powder and paste plant. And that—the personnel director for that facility was Charles Carter. And we were down there for a grievance meeting.

Q. When you say ''we,'' who was that?

A. It would have been myself, Gene Douglas, the secretary-treasurer, and the general shop steward for that plant, Jack Colts. I can't recall if he was actually present at that very second, but here again, we were down there, not for anything about drug testing. We were down there for a grievance meeting. And I was informed by Charles Carter, here again, in a low key manner, that Reynolds Metals was going to implement the drug testing program.

Q. And what, if anything, did Mr. Carter say in response to you?

A. Well, he told me about the drug testing policy and I guess I repeated myself word for word from when I told Ike Growe that we were against it, but if indeed, Reynolds, you know, was hell bent, we wanted to sit down and negotiate. And I want to say that Charles' response was identical to Ike's, that he couldn't negotiate. He could only tell me of the implementation.

Q. At any time, did Local 155 authorize the International Union to bargain over drug testing?

A. Just the opposite.

Wisdom testified that during the grievance meeting in mid-May Growe said the Company was implementing the drug abuse policy. Stoll told Growe if management was going to implement it, then ''we [Local 155] would want to sit down and negotiate it.'' Growe replied, there will be no negotiations.

Growe recalled several phone conversations with Stoll about the SAP but did not recall any discussion in person with Stoll about the SAP. Growe believes he notified Stoll by phone that the SAP was to be implemented prior to sending Stoll the letter of May 20, 1988 advising of Respondent's adoption of the SAP (R. Exh. 26). Growe does affirm that Stoll said he was totally against any testing process and that he told Stoll the policy was being discussed at the International level between the Union and the Company. Growe denies that Stoll mentioned anything about negotiating the SAP with the local union in any of the conversations and particularly does not recall any conversation with Stoll involving the SAP and any reference to ''shove it up his ass.''

On May 25, 1988, Stoll or someone from the Union's office, initiated a grievance for filing in all three plants (G.C. Exh. 4). The grievance subject was a drug testing program. The grievance logs for all three plants contain the filing entry but no other entries to indicate processing (R. Exh. 27, 28). Stoll could not give any particulars on the grievance filing other than to say that he thought he filed the grievance based on prior conversations with both Growe and Carter.

Carter testified that the only conversations he had with Stoll concerning the SAP occurred after he sent the May 26, 1988 letter to Stoll advising him that the Company had adopted the SAP (R. Exh. 24). Stoll, in the phone conversations, objected to the SAP as nothing more than a tool to be used against employees that could be abused in respect to requiring drug testing. Carter told Stoll that the SAP was not a tool but was an addition to the employee assistance programs (REAP) which had been successful. Carter did not receive a bargaining request from Stoll for the SAP in May or any other time. Carter had no immediate recall of the grievance filing but did explain that the grievant is the moving party under their system. Once filed, no meetings are scheduled on a grievance unless and until requested by the grievant. No meeting request was made by the Union for the drug testing grievance.

Growe recalled that when the grievance was filed he notified the Regional Industrial Relations Director Michael Foster, who advised him to get back if anything further developed. Nothing further developed.

In July 1988, Local 155's negotiating committee, through Stoll, presented written contract proposals to Growe and Carter for the upcoming early negotiations for a new contract. The local proposals by Stoll did not include any proposals on the SAP (R. Exh. 25). Early negotiations between the joint bargaining committee of the ABG and Peterson (coordinated with the Steelworkers and the ALCOA units) began the first week of August in Cincinnati. During the first week of negotiations the General Counsel of the ABG filed 10 unfair labor practice charges against an equal number of Respondent's plants charging violations of Sections 8(a)(5) and 8(d) of the Act based upon implementation of the corporate SAP. Albeit the charges were filed on behalf of the ABG and its respective local unions the subject of the SAP was not raised in negotiations nor was it discussed in negotiations. It simply never came up.

On Wednesday, August 10, 1988, following a negotiating session, Peterson and his team were leaving the hotel. As they passed through the lobby, La Baff and Murphy called to them. La Baff suggested that an appropriate way to deal with the SAP would be a special meeting for the purpose of considering the matter. Peterson agreed to meet at the Union's convenience and La Baff suggested the following Friday. Peterson told La Baff that was agreeable and to let him know the particulars. No special meeting was ever scheduled.

Later during a break in negotiations, Murphy told Peterson the ABG was aware that the Company was bargaining with the Steelworkers over the SAP. Murphy asked Peterson if the Company had made any concessions to the Steelworkers. Peterson replied in the affirmative and Murphy further asked if the Company would extend the same concessions to the

ABG. Peterson told Murphy that to resolve the matter he would extend to ABG the same concessions. At that point the conversation ended.

The negotiations for a contract between Respondent and the two unions continued but Peterson was unable to reach agreement with either ABG or the Steelworkers. Negotiations ceased, to be continued at a later date.

On September 2, 1988, during the investigation of the charges by the Board's Regional Office, Respondent's attorney Laden sent a position letter to the Regional Office. In part, the letter acknowledged that Stoll in mid-May had requested bargaining on the SAP from Carter and Growe (G.C. Exh. 5), a fact later explained by Laden as a mistake due to the volume of communications involved in answering the several charges that had been filed nationwide.

In late November, Peterson and both unions met in Cincinnati again. After several sessions Peterson reached agreement with both unions. The ABG agreement was effective immediately, November 1, 1988, to May 31, 1992, replacing the June 1, 1986, to May 31, 1989 contract (G.C. Exh. 3). During the final negotiations the SAP was neither raised as a subject nor discussed between the parties.

A hiatus of concern for the SAP, on behalf of the ABG, occurred from November 1988 to September 1989. On September 12, 1989, following a request from the ABG that Respondent reconsider and bargain with the local unions over the procedure for enforcing the SAP, Peterson sent a letter to Murphy. Peterson agreed to negotiate with the local unions on procedures based on a timely request and an agreement that the SAP as implemented will remain in effect during negotiations with any local union. Further, absent a timely request from a given local union the SAP in that location would be the plant rule as implemented (R. Exh. 21). Murphy, of the ABG, responded to Peterson on September 27, 1989 (R. Exh. 22). The ABG, through Murphy, accepted Peterson's proposal for ground rules to control bargaining with local unions over procedures enforcing the SAP and sent copies to all local unions. One local union requested bargaining in response to Murphy's acceptance of Peterson's proposal, however, no bargaining actually took place.

Another SAP hiatus consumed the time until October 1991 when the President's meeting convened. Respondent's president Richard Holder, Peterson, Newman, Stark, and John McGill represented the Company. La Baff, Murphy, and Harvey Martin, ABG secretary-treasurer represented, the Union. Historically the president's meetings have been to confirm the good will between the parties and to cement future relations in a social atmosphere. During this meeting the parties discussed the SAP and Peterson told La Baff that the Company was still prepared and willing to negotiate with the local unions over SAP enforcement procedures. La Baff expressed the reasonableness of the Company's position and stated he would discuss the situation with the local unions. Later, Murphy informed Peterson that the local unions were agreeable to negotiations but, Local 155 wanted to bargain in May 1992, rather than then.

Analysis

The facts of record are substantially undisputed, excepting the material fact of a demand to bargain by Local 155 in mid-May 1988. The alleged demand to bargain over the SAP by Stoll is material because the General Counsel's theory presumes Local 155 alone, is the exclusive joint bargaining representative with whom Respondent has a single obligation to bargain. General Counsel's theory may partially be based on record testimony that the International Union (ABG) authorized Local 155 to bargain over drug testing thereby precluding the International Union from bargaining. Notwithstanding the absence of evidence that such authorization predated the critical events herein, it is instructive as to the origin of any bargaining rights for Local 155 with respect to the SAP. Albeit in May 1988, no bargaining authority issue existed, Stoll allegedly made an oral demand to bargain locally over the SAP. Stoll's recall of the ''demand'' was a bare account outlining statements that would substantiate the allegations of the complaint yet reflecting almost a complete lack of recollection for the context in which they were made. Stoll's account, and Wisdom's account as well, were ambiguous relative to Respondent's implementation of the SAP and the alleged demand was qualified by this ambiguity. Whereas other record evidence clearly established Respondent's intent to implement the month before, neither Stoll nor Wisdom's related conversation was based upon such certainty of events. There is no question that conversations took place in mid-May with Growe and Carter and there is no doubt that Stoll objected to the SAP as implemented by Respondent. However, it is more plausible to me that if Stoll had made an oral demand to bargain, he, as an experienced union official, would have reduced the demand to writing rather than submit grievances reduced to writing to Growe and Carter. Moreover, little if any importance was attached to the SAP implementation by Stoll for he never followed up on his oral demand or his written grievances. The utterance and the filing stand alone. While I credit Stoll's testimony of conversations that are undenied, I discredit his testimony of conversations with Growe and Carter except where corroborated by Growe and Carter. Both Growe and Carter deny that Stoll ever made a demand to bargain over the SAP to them and under all the circumstances and based upon the record as a whole I credit the denials of Carter and Growe. Wisdom's testimony is nothing more than a parroting of Stoll's account and suffers from the same ambiguity and lack of plausibility. I therefore discredit Wisdom's account of the alleged demand to bargain by Stoll. Assuming arguendo, I further find that Stoll's alleged demand, if made as stated by Stoll, is insubstantial and does not constitute a demand for bargaining necessary to give rise to a statutory obligation to bargain on the part of Respondent.

The International constitution effective in 1987, as well as its predecessor and its successor in article XV, section 1, state that the International Union (ABG) shall negotiate all labor agreements on behalf of the local unions. Further, the International president, or his designate, shall be the chairman of all negotiating committees. Moreover, the collective-bargaining agreement effective June 1, 1986, to May 31, 1989, in its preamble states, ''The Aluminum, Brick and Glass Workers Union, Number 155, Louisville, Kentucky; and Number 400, Richmond, Virginia; and the Aluminum, Brick, and Glass Workers International Union *acting as sole bargaining agency* for the employees of the company . . . .'' (Emphasis added.) Historically, a national agreement has been negotiated with ABG for all of Respondent's plants with each local union then negotiating local issues separately, thus, the joint bargaining representative status.

General Counsel contends that significant changes in the International constitution, article XV, installed Local 155 as the bargaining representative for negotiations on the SAP at the Louisville facilities. General Counsel emphasizes the language contained in the July 31-August 4, 1989 International constitution which included an additional phrase in section 1. ''The International Union shall negotiate all labor agreements on behalf of the local unions, *and such agreements shall be subject to membership ratification*. [Emphasis added.)

No other changes were made in article XV. In my view the change was less than substantial, in that the manner of conducting negotiations, i.e., the International president is chairman of all negotiating committees and the International Union is the primary bargaining agent for the joint bargaining representatives, is unchanged. As clearly demonstrated by the language itself, Local 155 simply has the new right to ratify, or not, the national agreement negotiated by the joint bargaining committee of the ABG. Just as clearly this right of ratification of the national agreement came into existence with the August 1989 constitutional convention. The constitutional change therefore postdated the critical events herein. General Counsel's evidence of the settlement by Local 155 of the local strike in 1986 is irrelevant in reference to new found authority of Local 155. The International constitutions have consistently provided that strike votes can be taken by local memberships and local unions may carry out any economic action they deem necessary on issues within their jurisdiction with the approval of the president of the International Union. The record evidence shows that Local 155 membership voted strike over a two-tier wage system that was unique to the Louisville facilities and although strike settlement began on the International and corporate level, the International president acquiesced and allowed Local 155 to settle its own strike. There is no evidence that any residual local authority over contract negotiations existed after the strike ended. Stoll's testimony that Local 155 did not authorize the International Union to bargain over drug testing is an unsupported, self-serving incongruity unworthy of credence. Stoll's statement presumes more than a factual basis not in evidence. The import of the statement is contrary to the entire weight of the record evidence, the historical bargaining procedures of the parties and the International constitution which governs both the ABG and the local unions. The International Union as the primary bargaining authority, may in accord with the International constitution, grant subordinate authority to a local union. There is no evidence of such a grant of authority relative to the SAP prior to September 1989, and then several qualifications were extant due to a written agreement between the ABG and Respondent covering the future negotiations.

The bulk of the record evidence comes from the undisputed testimony of Peterson. He testified in a forthright and direct manner, even as to certain matters unfavorable to Respondent and it corresponded with a number of objective considerations. I credit his testimony completely. The evidence shows that a SAP was initiated by the ABG and later Respondent prepared and adopted its own. The ABG, in writing, demanded to bargain over the Respondent's policy for all unit employees and applicants. Contrary to ABG's demand for bargaining it is clear that an Employer's statutory duty to bargain attaches only to current employees represented by a union in an appropriate unit. No bargaining obligation exist for applicants for hire. It is equally clear, as admitted in the pleadings, that a SAP is a mandatory subject of bargaining for unit employees. As a general rule it is an unfair labor practice for an employer, whose employees are represented by a union, to establish or make changes in conditions of employment involving a mandatory subject of bargaining, without first providing the employees' representative with an opportunity to bargain over the changes.

Here the parties, represented as always by Peterson and La Baff, and pursuant to La Baff's demand to bargain, met on three different occasions to discuss the Respondent's SAP. At the behest of La Baff the third meeting included the ABG's joint bargaining committee and La Baff ended the meeting by telling Peterson he would respond on behalf of the ABG within a week. Stoll's undisputed testimony of the joint bargaining committee's caucus, that none of the local unions present agreed with drug testing in principle, is plausible under all the circumstances and I credit the testimony. With the failure of a response and after repeated request from Peterson to respond, the Respondent notified the ABG that the SAP would be implemented as last presented to the ABG. La Baff did not reply to the notice of implementation but ABG's general counsel did stating that implementation could not take place until agreed to by the ABG. No further demand to bargain was made albeit the general counsel did suggest that the earliest negotiations could take place would coincide with negotiations for a new contract. A position that bargaining, notwithstanding the prior negotiations, could not take place for 12 months. Why the ABG abandoned the demand for bargaining made 8 months before, particularly in view of the obvious objections to drug testing by the local unions, is known only to them.

The 1986–1989 agreement between the parties is silent on a SAP and admittedly the parties never discussed drug testing during negotiations. Thus the issue of a SAP is an open one for bargaining. But just as a response to a demand for bargaining must be continuous so must the demand be continuous. Any unexplained hiatus or abandonment of the demand is perilous to a continuing obligation to bargain. The Board has held that where an employer gives a union advance notice of an intention to make a change in a term or condition of employment, the union must make a reasonably timely demand for bargaining over the matter to avoid a finding of waiver or acquiescence. It cannot be denied that the union, once demanding to bargain over the issue, must continue to do so to the point of an agreement or to a bona fide impasse. For that is the obverse of the employer's statutory obligation to bargain with the union. Failure of the union to bargain continuously, particularly in the absence of any reason for the failure, constitutes inaction on the part of the union and results in abandonment of its right to bargain.

The numerous unfair labor practice charges filed by the ABG in August 1988, and based on Respondent's expressed intent in April 1988, do not constitute a demand for further bargaining over the SAP. Nor do the grievances filed by Local 155 in May 1988 over the Respondent's intent to implement the SAP constitute a further demand for bargaining over the SAP. The Board law is clear; simply protesting the Respondent's action by filing a charge or filing a grievance is not enough to preserve the right to bargain for the union. The law is equally applicable to the attempted resurrection of a prior demand to bargain. The filing of a charge or the

filing of a grievance are not sufficient in law to preserve the unions' continued right to bargain where the initial demand to bargain was at first pursued then abandoned.

Under general principles of Board law a waiver of a statutory right must be clear and unmistakable. Waiver of a statutory bargaining right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakable waived its interest in the matter. The ABG's avoidance, for whatever reason, of further bargaining over the SAP in the face of Respondent's repeated queries for bargaining, envinces a clear and unmistakable lack of interest in the SAP. In my view this avoidance and lack of interest constitutes a waiver by inaction justifying Respondent's implementation of the SAP at its plants where employees are represented by the ABG.

Respondent argues alternatively that the parties bargained to impasse. The record evidence of the negotiating sessions is too sparse in substance upon which to base a determination of impasse. The resolution of an impasse issue, unlike the waiver issue in the present circumstances, requires specifics of a bilateral discussion. I therefore make no findings on impasse.

Contrary to General Counsel I conclude and find that the die was cast by the ABG establishing negotiations of SAP on a national basis pursuant to their written demand to bargain. Respondent, based upon ABG's demand, negotiated over the SAP as the statute requires. ABG is an exclusive joint representative of Respondent's employees and by contract and historical negotiation is the sole or primary agent for bargaining. Therefore the failure or refusal to negotiate with Local 155 over the SAP, whether a demand was made or authorization to bargain locally was granted, does not, under the circumstances presented herein, constitute an unfair labor practice and I so conclude and find.

CONCLUSION OF LAW

The General Counsel has failed to sustain his burden of proof that Respondent failed and refused to negotiate with Local 155 over the SAP in violation of Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

It is ordered that the complaint be dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.